Supreme Court, U.S.
FILED
SEP 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-114

In The

Supreme Court of the United States

October Term, 1990

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND ALBERT C. DAYTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

THOMAS R. MICHAEL
Attorney for Albert C. Dayton

MICHAEL & KUPEC
228 Court Street
Clarksburg, WV 26301
(304) 623-6678

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether there are exceptional circumstances in this case which would justify the grant of a writ of certiorari to review an interlocutory order which remanded this case to the Department of Labor for further administrative proceedings?

2. Whether this Court should consider the Petitioner's claimed due process violation, when the Petitioner never raised this issue below, and when the question was not passed upon by the Court of Appeals?

3. Whether a public official interested only in the performance of his official duty may challenge the Constitutional validity of a statute?

TABLE OF CONTENTS

Page

Statement 1

Argument 3

Conclusion 5

TABLE OF AUTHORITIES

CASES:

American Construction Co. v. Jacksonville T. & K. W.R. Co., 148 U.S. 372, 384 (1893) 4

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 234 (1936) 4, 5

Dayton v. Consolidation Coal Company, 895 F.2d 172 (4th Cir. 1990) 5

Sykes v. Director, 812 F.2d 890 (4th Cir. 1987) 2

Youakim v. Miller, 425 U.S. 231, 234 (1976) 4

STATUTES AND REGULATIONS:

Black Lung Benefits Act, 30 U.S.C. 902(f)(2) 3, 5

20 C.F.R.:

Section 410.490 ..... 2, 3

Section 727.203 3

Section 727.203(a)(2) 2

Section 727.203(b)(2) 2, 4

Section 727.203(b)(4) 2, 3, 4

No. 90-114

In The

Supreme Court of the United States

October Term, 1990

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND ALBERT C. DAYTON,

Respondents.

Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR ALBERT C. DAYTON, RESPONDENT

STATEMENT

Albert Dayton applied for black lung benefits in 1979, after working for 17 years as a coal miner. The Department of Labor approved his application, but this ruling was appealed by Consolidation Coal Company, the responsible coal mine operator.

A hearing was held before an Administrative Law Judge. The record before the ALJ contained conflicting

medical opinions on the questions of disability and the existence of pneumoconiosis.

The ALJ found that Dayton was entitled to the presumption of eligibility contained in the Department of Labor Regulations, 20 C.F.R. 727.203(a)(2), based on his years of coal dust exposure and his low scores on the ventilatory studies of his lung function. Pet. App. 19-20.

The ALJ concluded, however, that Dayton's respiratory impairment was not totally disabling, and that this evidence established rebuttal of the presumption under 20 C.F.R. 727.203(b)(2). The ALJ also found that Dayton did not have pneumoconiosis, establishing rebuttal under 20 C.F.R. 727.203(b)(4). The miner appealed this decision to the Benefits Review Board, arguing that the ALJ's finding under subsection (b)(2) was improper, because rebuttal under this subsection requires proof of the absence of total disability, regardless of cause. *Sykes v. Director*, 812 F.2d 890 (4th Cir. 1987). The Board never reached this issue, however, because they affirmed the finding that Dayton did not have pneumoconiosis, establishing rebuttal under subsection (b)(4). Id. at 10 n.1.

The Board also rejected the miner's claim that he was entitled under 20 C.F.R. 410.490, stating that a finding of no pneumoconiosis precluded entitlement. Id. at 12 n. 2.

The miner appealed again to the Fourth Circuit Court of Appeals. He argued that subsection (b)(4) rebuttal was improper because the evidence did not establish the absence of legal pneumoconiosis (the disease as defined in the Black Lung Act), and that the ALJ only found the absence of clinical pneumoconiosis. The Fourth Circuit panel did not reach this issue, because they held that the

subsection (b)(4) rebuttal method was not available to the employer under 20 C.F.R. 410.490.

The Court of Appeals held that the use of the subsection (b)(4) method of rebuttal resulted in criteria more restrictive than Section 410.490, thus violating the statutory prohibition. 20 U.S.C. 902(f)(2). Id. at 5.

The Court of Appeals also declined to rule on the due process claim, because it was raised by the Director and not by the coal company.

The Court then remanded the case for consideration of rebuttal under 410.490.

ARGUMENT

Respondent Dayton agrees with the Petitioner that the Circuits disagree, and that the issues involved are important, to miners as well as coal companies.

Respondent Dayton, however, believes the decision below was correct. The Department of Labor regulations allow rebuttal in more ways, and by other evidence, than allowed under the earlier regulation. Thus, miners who would prevail under Section 410.490 may lose under Section 727.203. Clearly, then, the 727.203 rebuttal criteria are more restrictive, and violate the prohibition of 30 U.S.C. 902(f)(2).

Nonetheless, this case is not in a proper posture for review. The order of the Court of Appeals was interlocutory. The Court remanded the case to the Department of Labor for consideration of rebuttal under Section 410.490. Furthermore, there has never been a final ruling on the

miner's appeal of the ALJ's finding of rebuttal under subsections (b)(2) and (b)(4).[1]

This Court should not issue a writ of certiorari to review an appeal from an interlocutory order, "unless it is necessary to prevent extraordinary inconvenience and embarrassment". *American Construction Co. v. Jacksonville T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893). There are no such circumstances in this case, and none are mentioned in the Petition. Indeed, any decision by this Court upon review would only result in another remand.

Also, Petitioner now raises a "significant due process question". Id at 16. However, Petitioner never raised this issue below, and it was not passed upon by the Court of Appeals. Ordinarily, this Court does not decide questions not raised or resolved in the lower Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Because the Petitioner failed to raise this issue below, it is not properly before this Court.

Finally, the Director has no standing to raise the due process issue. The Court of Appeals properly declined to address this issue when it was raised by the Director below:

> "A court may not pass upon a constitutional issue unless the question is raised by a party whose interests entitle him to raise it. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Justice Brandeis concurring). The Director here does not pursue a due process challenge in his own right; he argues that our construction of §902(f) violates the coal operator's due process rights. A court, however, will not pass upon the constitutional validity of a statute "upon complaint of one who fails to show that he is injured by its operation . . . Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained." *Ashwander*, 297 U.S. at 348."

Dayton v. Consolidation Coal Company, 895 F.2d 173 (4th Cir. 1990).

The Director has not filed a petition or cross-petition with this Court. The Director cannot, and has not, placed the due process question before this Court.

[1] The Respondent disagrees completely with Petitioner's statement in its Motion to Consolidate that the only "operative facts" are that Dayton does not have pneumoconiosis or any disability related to the disease. There has never been a final finding of fact on these issues. However, Respondent does not object to consolidation if certiorari is granted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS R. MICHAEL
Albert C. Dayton, Respondent

MICHAEL & KUPEC
229 Court Street
Clarksburg, WV 26301